

89-886

No. _____

Supreme Court, U.S.

FILED

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In The
Supreme Court of the United States
October Term, 1989

CAROLYN ROBERTS; LORETTA BROUSSARD;
STEPHANIE COOPER; KAREN BECK; RENAY SYKES,

Petitioners,

vs.

CLARENCE THOMAS, CHAIRMAN
UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTION PRESENTED

1. Whether the opinion below, which affirmed the district court's ruling that petitioners were not entitled to challenge the Equal Employment Opportunity Commission's decision to refuse to excuse the untimely filing of their complaints under 29 C.F.R. Section 1613.214(a)(4) by presenting to the court evidence that was not presented to the Equal Employment Opportunity Commission, should be reversed.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit were defendant-appellee Clarence Thomas, Chairman of the United States Equal Employment Opportunity Commission and plaintiffs-appellants Carolyn Roberts, Loretta Broussard, Stephanie Cooper, Karen Beck and Renay Sykes, who bring this petition.

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vs.

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UNITED STATES EQUAL EMPLOYMENT
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Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Petitioners Carolyn Roberts, Loretta Broussard, Stephanie Cooper, Karen Beck and Renay Sykes respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on August 31, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit, which is unreported, is reprinted in the appendix

hereto. (Appendix (hereinafter "App.") at App. 17) The order of the Central District of California (Kozinski, A.) granting summary judgment and the Findings of Fact and Conclusions of Law, is reprinted in the appendix hereto. (App. 3-13)

JURISDICTION

The Court of Appeals rendered its opinion on August 31, 1989. This petition has been filed within ninety days of entry of the opinion and judgment of the United States Court of Appeals for the Ninth Circuit and is therefore timely pursuant to 28 U.S.C. Section 2101(c) (1982) and Sup.Ct.R. 20.4. The jurisdiction of this court is invoked pursuant to 28 U.S.C. Section 1254(1) (1982).

STATEMENT OF THE CASE

In the action below, petitioners Carolyn Roberts, Loretta Broussard, Stephanie Cooper, Karen Beck and Renay Sykes (hereinafter "petitioners"), current and/or former employees of the Los Angeles District Office of the Equal Employment Opportunity Commission (hereinafter the "Commission" or "EEOC"), contended that they were subjected to sexual harassment by Terrence Woods, former Chief of Operations Services of that office.

Three lawsuits have been filed by petitioners based on this claim and all have been dismissed for failure to exhaust administrative remedies. Petitioners initially filed suit in 1985. The case was dismissed on December 2,

1985 for failure to exhaust administrative remedies. (*Roberts I*) (App. 6)

On April 17, 1986, petitioners, through their counsel, pursuant to 29 C.F.R. Section 1613.214 submitted to respondent Clarence Thomas, chairman of the EEOC, a letter entitled "Complaint." The letter described the discrimination of which petitioners were complaining, namely that they "were subjected to verbal harassment by their former supervisor, Terrence L. Woods" because of their sex, female and was signed by counsel. (App. 6)

Petitioners again filed suit on July 1, 1986 (*Roberts II*) and contended that the April 17th letter was an administrative complaint of discrimination. The district court ruled that the April 17th letter could not be an "administrative complaint" under 29 C.F.R. Section 1613.214 because the document had been signed by petitioners' legal counsel and not petitioners themselves as required by the regulation. A summary judgment motion was granted, and the case was dismissed without prejudice and petitioners were given thirty days "to attempt to file an administrative complaint with the defendant pursuant to 29 C.F.R. Section 1613.214." (App. 7) Respondent was ordered "in the first instance, [to] determine whether such complaint is timely and, if the complaint is determined to be untimely, whether the defect shall be excused or waived." (App. 7)

Petitioners again attempted to file administrative complaints per Section 1613.214. Respondent Thomas rejected the new complaints as untimely, and decided not

to excuse or waive the alleged defect in timeliness as provided for in 29 C.F.R. Section 1613.214(a)(4).¹(App. 9)

Following the administrative rejection, the present case was filed. The district court again granted summary judgment ruling that administrative complaints per 29 C.F.R. Section 1613.214 had not been timely filed and that the EEOC had not abused its discretion by refusing to waive the untimeliness of petitioners' complaints and dismissed the action with prejudice. (App. 11-13)

A timely appeal from this order was taken to the United States Court of Appeals for the Ninth Circuit (No.88-6489) pursuant to 28 U.S.C. Section 1291. A panel of that court (Browning, Farris and Canby) affirmed, finding that the April 17th letter was not a complaint and that the EEOC did not err in finding that the formal complaints filed in May and June, 1987, were untimely, and that "the district court was correct in ruling that plaintiffs were not entitled to challenge the Commission's decision by presenting to the court evidence that was not presented to the Commission." (App. 21)

¹ The EEOC must excuse or waive the alleged defect in timeliness when "the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or . . . for other reasons considered sufficient by the agency." 29 C.F.R. Section 1613.214(a)(4).

REASONS FOR GRANTING THE WRIT

I. THE OPINION BELOW DECIDES AN IMPORTANT ISSUE OF FEDERAL LAW THAT HAS NOT BEEN AND SHOULD BE DECIDED BY THIS COURT

Petitioners seek review of that portion of the panel opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's ruling that petitioners were not entitled to challenge the EEOC's decision to refuse to excuse the untimeliness of petitioners' complaints under 29 C.F.R. Section 1613.214(a)(4), by presenting to the court evidence that was not presented to the Commission.

Petitioners contend that the district court, by limiting itself to a review of the administrative record, denied petitioners their right to de novo review of the EEOC's decision not to excuse the untimeliness of their complaints. Whether petitioners, under a de novo standard of review standard, should have been permitted to offer evidence to the district court that was not submitted to the Commission is an important question of federal law which has not been settled by this Court, thus presenting the special and important reasons for granting this petition specified by Sup.Ct.R. 17.1.

In making its ruling, the district court applied an abuse of discretion standard to the Commission decision to refuse to excuse the untimeliness of petitioners' complaints. (App. 10) However, the district court noted that even if it were to apply a de novo standard of review, it would reach an identical result. (App. 11) The district court found, based on the administrative record, that the Commission had not abused its discretion by refusing to

excuse the untimeliness of petitioners' complaints. (App. 13)

The appellate court affirmed the district court's ruling on this issue. However, in so doing it did not determine the appropriate standard of review to be applied because it found that even under a de novo review standard, the circumstances of this case did not require equitable tolling of the deadlines under 29 C.F.R. Section 1613.214(a)(4). (App. 20, 21)

Both the district court and the appellate court below determined that a review of the administrative record was sufficient, even under a de novo review standard, thus precluding petitioners from submitting additional evidence in response to respondent's motion for summary judgment. Petitioners, therefore, contend that the district court wrongly denied them their right to de novo review of the EEOC's decision to refuse to excuse the untimeliness of their complaints.

This Court in *Chandler v. Roudebush*, 425 U.S. 840 (1976), unequivocally held that federal employees are entitled to de novo review in the federal courts of all agency decisions involving federal employee discrimination claims. Petitioners contend, and one circuit has so held, that the de novo review standard of review applies to EEOC determinations as to whether the time deadlines should be tolled under 29 C.F.R. Section 1613.214(a)(4). *Kontos v. U.S. Department of Labor*, 826 F.2d 573, 575 n.4 (7th Cir. 1987).

Accordingly, it was therefore improper for the district court below to limit the scope of its review of petitioners' claims to the administrative record under a de novo

review standard. Petitioners should have had the opportunity to offer evidence not contained in the administrative record and the court's review should have included consideration of such evidence.

Limiting the court's review to the administrative record is particularly inappropriate in the context of a summary judgment motion. In this case, petitioners were not permitted to submit evidence to the court which may have demonstrated the existence of a genuine issue of material fact and defeated respondent's motion for summary judgment.

Although both the district court and the appellate court found that even under a de novo review standard, petitioners failed to demonstrate why the untimeliness of their complaints should be excused, both courts relied solely on the administrative record and petitioners were not permitted to offer evidence to supplement the administrative record.

Petitioners contend that the district court's ruling is inconsistent with this Court's ruling in *Chandler* which guarantees a federal employee a right to de novo review of all-agency decisions relating to discrimination and that the district court's order granting summary judgment deprived petitioners of their right to de novo review of the EEOC's decision not to excuse the untimeliness of their complaints.

CONCLUSION

For these reasons, this petition for certiorari should be granted. Petitioners respectfully submit that the opinion and judgment below should be vacated and the matter remanded to the district court for reconsideration of the tolling question presented by 29 C.F.R. Section 1613.214(a)(4).

Dated: November 29, 1989

Respectfully submitted,

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App. 1

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
Civil Minutes - Appeals

Case No. CV-87-7617-AK

Date 11/16/89

Title Carolyn Roberts, et al vs. Clarence Thomas

PRESENT: THE HON. ALEX KOZINSKI (Sitting by Des-
ignation), JUDGE

R.H. MAZZARELLA
Deputy Clerk

NONE
Court Reporter

ATTORNEYS FOR PLAINTIFF

- 1) NONE
2) _____
3) _____

ATTORNEYS FOR DEFENDANT

- 1) NONE
2) _____
3) _____

PROCEEDINGS: FILING AND SPREADING MAN-
DATE OF THE NINTH CIRCUIT
COURT OF APPEAL

☐ IN COURT

☒ IN CHAMBERS (No hearing
necessary)

App. 2

☒ COUNSEL NOTIFIED

THE COURT ORDERS that the mandate of the Ninth
Circuit Court of Appeals: ☒ Affirming ☐ Reman-
ding ☐ Reversing and Remanding
☐ Affirming in part, reversing in part ☐ Dismiss-
ing Appeal

☐ The record reflects that costs of the prevailing
party were taxed by the Ninth Circuit Court of
Appeals in the amount of \$_____ on _____.

☐ Other _____
is hereby filed and spread upon the minutes of this U.S.
District Court.

ENTERED _____)

☐ MAKE JS-5

Initials of Deputy Clerk /s/ RHM

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

***** No. CV 87-
CAROLYN ROBERTS, et al., * 7617-AK
*
Plaintiffs, * JUDGMENT
*
v. * (Filed August
* 24, 1988)
CLARENCE THOMAS, etc., *
* THIS CONSTITUTES
Defendant. * NOTICE OF ENTRY
* AS REQUIRED
* BY FRCP, RULE 77(d).

Based on the Statement of Uncontroverted Facts and
Conclusions of Law which is being filed concurrently,
defendants' motion for summary judgment is granted.
Accordingly, judgment is entered in favor of defendants
and against plaintiffs.

Dated: August 23, 1988

/s/ Alex Kozinski
Alex Kozinski, Circuit Judge
(sitting by designation)

App. 4

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

***** No. CV 87-
CAROLYN ROBERTS, et al., * 7617-AK
Plaintiffs, * STATEMENT OF
v. * UNCONTROVERTED
CLARENCE THOMAS, etc., * FACTS AND CON-
Defendant. * CLUSIONS OF LAW
* (Filed August
* 24, 1988)

STATEMENT OF UNCONTROVERTED FACTS

1. The Plaintiffs in this action are Karen Beck, Renay Sykes, Carolyn Roberts, Stephanie Cooper, and Loretta Broussard. Plaintiffs are or were employees of the Equal Employment Opportunity Commission ("EEOC"). All claim to have been sexually harassed by Terrence Woods, former Chief of Operations Services of the EEOC's Los Angeles District Office.

2. On June 11, 1982, Beck contacted an equal employment opportunity ("EEO") counselor and alleged that she had been sexually harassed on June 4, 1982. EEO counseling was terminated on June 28, 1982, and Beck did not file a formal complaint of discrimination at that time.

3. Sykes contacted the same EEO counselor on June 11, 1982, and alleged that she had been sexually harassed on June 4, 1982. EEO counseling was terminated on June 28, 1982, and Sykes did not file a formal complaint of discrimination at that time. Sykes thereafter saw the EEO counselor on January 20, 1983, and alleged that she had

been denied a promotion as reprisal for her prior complaint. Counseling was terminated on March 21, 1983, and Sykes did not file a formal complaint of discrimination at that time.

4. Roberts claims that she saw an EEO counselor on two occasions: In January 1983 she complained to Barbara Hill about sexual harassment that had taken place throughout 1982, and in October 1984 she again contacted Ms. Hill about a promotion she did not receive. Roberts did not file any formal complaints of discrimination at either time.

5. Cooper contacted an EEO counselor on November 5, 1981, about an alleged incident which occurred on October 13, 1981. Counseling was terminated on February 10, 1982, and Cooper did not file a formal complaint of discrimination at that time.

6. Broussard claims that she was subjected to sexual harassment in 1981. She claims that she informed several people, including her office chief, about this incident. However, none of those people was an EEO counselor. Broussard did not file a formal complaint of discrimination at that time.

7. On February 28, 1985, an attorney from plaintiffs' counsel's law firm wrote the EEOC on behalf of four of the plaintiffs (not including Cooper), and demanded that the EEOC either grant the four a hearing or issue a final agency decision so that the four could proceed to district court.

8. The EEOC responded on March 27, 1985, in a letter which set forth the procedure and legal citation for

App. 6

filing complaints of discrimination. The EEOC explained that it was unaware of any current Title VII complaints filed by the employees.

9. On August 1, 1985, plaintiffs filed *Roberts v. EEOC*, No. CV 85-5081 AWT (C.D. Cal.) ("*Roberts I*"). Judge Tashima dismissed that action on December 2, 1985, for failure to exhaust administrative remedies.

10. As a result, on December 11, 1985, present counsel for plaintiffs ("counsel") telephoned the EEOC, and requested counseling for all five plaintiffs. Counsel was advised to contact the EEO counselor in the Los Angeles district office. The EEO counselor, however, later reported that she had never been contacted.

11. On April 7, 1986, counsel wrote the EEOC, and again requested counseling. In response, on April 11, 1986, the EEO counselor called counsel, who was out. Counsel never returned the call.

12. On April 17, 1986, counsel again wrote EEOC, and again requested pre-complaint processing. He also wrote EEOC a second letter on that same date, and purported to file a formal complaint of discrimination on behalf of his clients. However, this second letter was only signed by counsel.

13. In response, the EEO counselor attempted to telephone counsel on five occasions between April 23, and May 2, 1986. Counsel never returned these calls. The EEO counselor finally wrote counsel on May 19, 1986, and requested that counsel provide information in writing as to the circumstances and dates of the alleged sexual harassment. Counsel was advised to provide such

information by May 30, 1986, and that in the event that such information was not provided, the EEOC would cease pre-complaint processing and would issue a Notice of Final Interview.

14. On May 21, 1986, counsel agreed to present his clients to EEOC for counseling on May 30, 1986. However, he cancelled the counseling session on May 30, 1986.

15. On June 18, 1986, the EEOC notified counsel that counseling activities were closed as counsel had been advised in its May 19, 1986, letter. Counsel was sent a Notice of Final Interview, as well as a complaint form and the EEO counselor's survey. Both the transmittal letter and the Notice of Final Interview stated that a complaint must be filed within fifteen calendar days after receipt. Plaintiffs never filed complaints of discrimination.

16. Instead, on July 7, 1986, Plaintiffs filed *Roberts v. Thomas*, No. CV 86-4389 AK (C.D. Cal.) ("*Roberts II*"), and contended that the second April 17, 1986, letter was an administrative complaint of discrimination. By order entered on May 6, 1987, this court rejected that argument, and concluded that the second April 17, 1986, letter was not a complaint of discrimination, since it was not signed by any of the plaintiffs, as required by regulation. Plaintiffs were accorded thirty days "to attempt to file an administrative complaint with defendant pursuant to 29 C.F.R. § 1613.214." Defendant was ordered "in the first instance, [to] determine whether such complaint is timely and, if the complaint is determined to be untimely, whether the defect shall be excused or waived."

17. Plaintiffs filed complaints of discrimination in late May and early June 1987. The EEOC acknowledged

receipt of the complaints on July 30, 1987, and by letters dated August 14, 1987, requested further information regarding the dates of the alleged discrimination as well as "any argument or evidence [plaintiffs] would like the agency to consider under 29 CFR 1613.214(a)(4)." Plaintiffs were warned that their failure to provide the latter information would result in the EEOC making the timeliness determination based upon available information.

18. Counsel responded on August 26, 1987. Instead of responding to the request for timeliness information, and in an effort "to avoid the cost of needless duplication of documents," he requested that the EEOC advise him of the documents "currently . . . available in making a determination on the issue of timely contact of an EEO Counselor." He further stated that

Carolyn [Roberts] contacted EEO Counselor Barbara Hill, and our other clients contacted EEO Counselor Aurora LeBrun pertaining to sexual harassment committed by Terrence Woods. Additionally, Renay Sykes also contacted EEO Counselor Annie Cade. None of the EEO Counselors rejected our clients' claims on the basis of untimeliness. I will assume that the records prepared by Ms. Hill, Ms. LeBrun, and Ms. Cade are available to EEOC, and would probably be the best source material as to the dates when sexual harassment began.

He noted that the EEOC had available to it prior declarations, depositions and other evidence from *Roberts II*. Counsel finally stated that "[a]t no time were [plaintiffs] advised of any time limitations in which to file administrative complaints pursuant to 29 CFR § 1613.214."

19. Counsel then wrote the EEOC on October 11, 1987, requesting information as to the timeliness investigation, and inquiring "whether [EEOC was] in need of any other evidence, documentary or testimonial, for [its] investigation."

20. However, the EEOC was by that time preparing its final decision on the matter. By letters dated between October 14, 1987, and November 17, 1987, the EEOC rejected plaintiffs' complaints as untimely, and refused to extend the time limitations. Plaintiffs were informed that they could file a civil action in district court within thirty days.

21. On November 12, 1987, plaintiffs filed this action ("*Roberts III*").

22. On May 16, 1988, defendant filed a motion to dismiss or, in the alternative, for summary judgment. Plaintiffs filed their opposition on June 14, 1988. Although plaintiffs had over four weeks to prepare their opposition, they did not provide any declarations in opposition to defendant's motion. Nor did they seek a continuance pursuant to Fed. R. Civ. P. 56(f).

CONCLUSIONS OF LAW

1. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sex in federal personnel actions. 42 U.S.C. § 2000e-16(a)(1982). In bringing a Title VII discrimination claim, a federal employee faces three separate deadlines: First, the employee must bring any complaint to the attention of an EEO counselor within thirty days of the occurrence of the conduct complained

of. 29 C.F.R. § 1613.214(a)(1)(i) (1987). Second, if the complaint is not resolved informally, the employee must file a formal complaint within fifteen days of her final interview with the EEO counselor. *Id.* at § 1613.214(a)(1)(ii). Third, after administrative hearing and rejection of the complaint by the agency, the employee must file a civil suit in district court within thirty days of the rejection. 42 U.S.C. § 2000e-16(c)(1982).

2. The formal complaint will be accepted for processing only if both the first thirty-day deadline and the second fifteen-day deadline are met. 29 C.F.R. § 1613.214(a)(1). However, the agency is required to extend these time limits if "the complainant shows that he was not notified of the time limits *and* was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or . . . for other reasons considered sufficient by the agency." *Id.* at § 1613.214(a)(4) (emphasis added).

3. The agency may reject a complaint it determines to be untimely. *Id.* at § 1613.215. The agency must issue a decision letter, which must "inform the complainant of his right to appeal the decision of the agency to the [EEOC] and of the time limit within which the appeal may be submitted and of his right to file a civil action as described in § 1613.281." *Id.*

4. We review an agency decision to reject a complaint as untimely for abuse of discretion. To the extent the decision incorporates issues of statutory interpretation, we review them *de novo*. *Blackfeet Tribe v. United States Dept. of Labor*, 808 F.2d 1355, 1357 (9th Cir. 1987);

Duval Corp. v. Donovan, 650 F.2d 1051, 1054 (9th Cir. 1981).¹

5. The complaints were untimely. The alleged misconduct occurred between 1981 and 1984, and none of the Plaintiffs completed full administrative processing in a timely fashion. The plaintiffs did not file complaints until 1987, after this court's decision in *Roberts II*. (As noted above, this court previously ruled in *Roberts II* that the April 17, 1986, letter of counsel was not a complaint of discrimination within the meaning of the regulations.)

6. Thus, the only question left to decide is whether the EEOC abused its discretion in refusing to excuse the plaintiffs' untimeliness. As noted, plaintiffs must establish that they were not notified of the time limits *and* that they were otherwise unaware of the time limits. Although plaintiffs raise an issue of fact as to whether or not they were notified of the time limits, they have failed to present evidence to either the EEOC or this court that they were unaware of the time limits.

7. Broussard alleges sexual misconduct which took place in 1981, but admits that she did not contact an EEO counselor at that time. She alleges that she informed the office chief of the problem. The applicable regulation, 29 C.F.R. § 1613.213(a), clearly requires her to contact an EEO counselor. An office chief is not the equivalent of an

¹ We note that the Seventh Circuit applies a de novo standard of review to agency decisions to reject a complaint as untimely. *Kontos v. United States Dept. of Labor*, 826 F.2d 573, 575 n.4 (7th Cir. 1987). Were we to apply a de novo standard of review, we would reach a result identical to the one we reach today.

EEO counselor. Broussard has proffered no reason to the agency for failing to contact an EEO counselor. The EEOC therefore did not abuse its discretion in refusing to excuse her untimeliness.

8. Neither did the EEOC abuse its discretion in refusing to excuse Roberts' untimeliness. She alleges misconduct which took place in 1982. However, she apparently did not see an EEO counselor until October 1984. Roberts alleges that there were no EEO counselors from the summer of 1982 until some time in 1983. Even if this were true, Roberts waited over a year before contacting an EEO counselor, a period when EEO counselors were admittedly available. She has offered no excuse for failing to act more promptly.

9. The situation of Sykes, Beck and Cooper is slightly different. Each sought EEO counseling in a timely fashion. However, none of them filed complaints during the required time period. Their claims were properly denied because they have presented nothing before either the EEOC or this court which establishes that they were otherwise unaware of the time limits.

10. The court notes that the plaintiffs were EEOC employees. As such, they might be more aware of their EEO rights than employees of other federal agencies. In any event, it was plaintiffs' burden to establish that they met the requirements of 29 C.F.R. § 1613.214(a)(4). Although the EEOC asked counsel to provide statements or evidence regarding the timeliness issue, nothing was provided. Plaintiffs simply failed to meet their burden of proof.

App. 13

11. Moreover, even when plaintiffs were notified of the fifteen-day time limit in June 1986, they still failed to file. By that time, it certainly could not be said that plaintiffs were unaware of the applicable time limits.

12. Plaintiffs have failed to show a basis for excusing their failure to file or to comply with the administrative process in a timely fashion. The EEOC thus did not abuse its discretion in refusing to excuse the plaintiffs' untimeliness.

13. Plaintiffs have failed to exhaust their administrative remedies. Their failure to exhaust precludes the bringing of this action. *Brown v. General Services Administration*, 425 U.S. 820, 832-33 (1976). Accordingly, there being no genuine issue of material fact, defendant is entitled to judgment as a matter of law.

Dated: August 23, 1988

/s/ Alex Kozinski
Alex Kozinski, Circuit Judge
(sitting by designation)

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CAROLYN ROBERTS, et al.,)	NO. CV 87-
)	7617-AK
Plaintiffs,)	
)	JUDGMENT
v.)	
)	
CLARENCE THOMAS, etc.,)	
)	
Defendant.)	
<hr/>		

Defendant's motion for summary judgment came on for hearing on June 24, 1988 before the Honorable Alex Kozinski, United States Circuit Judge, sitting by designation. Defendant was represented by Ian Fan, Assistant United States Attorney, and by Richard V. Roscio, Assistant Legal Counsel, Equal Employment Opportunity Commission. Plaintiffs were represented by Gerald Sato.

After consideration of the moving papers, as well as of the argument advanced at the hearing, and in conjunction with the Statement of Uncontroverted Facts and Conclusions of Law which are being filed concurrently with this judgment,

IT IS ORDERED that defendant's motion for summary judgment is granted. Accordingly, judgment is entered in favor of him and against plaintiffs.

DATED: ___, 1988

UNITED STATES CIRCUIT
JUDGE

PRESENTED BY:

ROBERT C. BONNER
United States Attorney
FREDERICK M. BROSIO, JR.
Assistant United States Attorney
Chief, Civil Division

/s/ Ian Fan
IAN FAN
Assistant United States Attorney
Attorneys for Defendant

CERTIFICATE OF SERVICE BY MAIL

I, ILENE S. WEITZNER, declare:

That I am a citizen of the United States and resident or employed in Los Angeles County, California; that my business address is Office of the United States Attorney,

United States Courthouse, 312 North Spring Street, Los Angeles, California 90012; that I am over the age of eighteen years, and am not a party to the above-entitled action;

That I am employed by the United States Attorney for the Central District of California who is a member of the Bar of the United States District Court for the Central District of California, at whose direction the service by mail described in this Certificate was made; that on August 5, 1988, I deposited in the United States mails in the United States Courthouse at 312 North Spring Street, Los Angeles, California, in the above-entitled action, in an envelope bearing the requisite postage, a copy of

Judgment

addressed to Gerald Sato
Allred, Maroko, Goldberg & Ribakoff
6380 Wilshire Blvd., Suite 1404
Los Angeles, California 90048

at his last known address, at which place there is a delivery service by United States mail.

This Certificate is executed on August 5, 1988 at Los Angeles, California.

I certify under penalty of perjury that the foregoing is true and correct.

/s/ Ilene S. Weitzner

Not For Publication

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CAROLYN ROBERTS; LORETTA)	
BROUSSARD; STEPHANIE)	
COOPER; KAREN BECK;)	
RENAY SYKES,)	
Plaintiffs-Appellants,)	CA No. 88-6489
-vs-)	DC No.
)	CV-87-7617-AK
CLARENCE THOMAS, Chairman,)	MEMORANDUM*
UNITED STATES EQUAL)	(Filed Aug 31, 1989)
OPPORTUNITY)	
COMMISSION,)	
Defendant-Appellee.)	

Appeal from the United States District Court
for the Central District of California
Honorable Alex Kozinski, Circuit Judge, Presiding
Argued and Submitted August 10, 1989
Pasadena, California —

BEFORE: BROWNING, FARRIS AND CANBY, CIRCUIT
JUDGES.

Plaintiffs appeal the grant of summary judgment in
favor of defendants. The district court's ruling was based
on plaintiffs' failure to exhaust administrative remedies

* This disposition is not appropriate for publication and may
not be cited to or by the courts of this circuit except as
provided by Ninth Cir. R. 36-3.

by filing timely complaints with the Equal Employment Opportunity Commission. We affirm.

The five plaintiffs are current or former employees of the Equal Employment Opportunity Commission in the Los Angeles District office. They all claim to have been sexually harassed by Terrence Woods, former Chief of Operations Services of that office. Several lawsuits have been filed by the plaintiffs based on these claims, but all have been dismissed for failure to exhaust administrative remedies.¹

In bringing a Title VII discrimination claim, a federal employee faces three separate deadlines. *See Cooper v. Bell*, 628 F.2d 1208, 1213 & n.8 (9th Cir. 1980). First, the employee must bring a complaint to the attention of an EEO Counselor within thirty days of the alleged discrimination. 29 C.F.R. § 1613.214(a)(1)(i)(1987).² If the

¹ Plaintiffs initially filed suit in 1985. The case was dismissed December 2, 1985, for failure to exhaust administrative remedies. *See Roberts v. EEOC*, No. CV 85-5081 AWT (*Roberts I*). Plaintiffs again filed suit on July 1, 1986 (*Roberts II*), after the EEOC sent them Notices of Final Interviews, along with formal complaint forms for each plaintiff, after attempts at counseling had failed. The district court held that a letter from counsel to the EEOC was not a formal complaint, and dismissed the action, without prejudice, for failure to exhaust administrative remedies. It ordered the plaintiffs to file formal complaints with the EEOC within thirty days. *See Roberts v. Thomas*, No. CV 86-4389 AK. After the EEOC rejected the complaints because they were not timely, plaintiffs filed this action, No. CV 87-07617 AK (*Roberts III*).

² All references to the Code of Federal Regulations are to the 1987 edition. The EEOC regulations were revised effective November 30, 1987. *See* 52 Fed. Reg. 41920 (1987). The 1987 revisions would not change the result.

complaint is not resolved informally, the employee must file a formal complaint within fifteen days of the final interview with the EEO counselor. *Id.* at § 1613.214(a)(1)(ii).³ Third, after administrative hearing and rejection of the complaint by the agency, the employee must file suit in district within thirty days of the rejection. 42 U.S.C. § 2000e-16(c).

The agency must extend the first two time limits, however, when "the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or . . . for other reasons considered sufficient by the agency." *Id.* at § 1613.214(a)(4).

Two issues are presented for review in this appeal. The first issue was litigated in *Roberts II*, and was held to be the law of the case in *Roberts III*. That issue is whether the April 17, 1986, letter from counsel for the plaintiffs to the EEOC was a formal complaint. The second issue, which arises in *Roberts III*, is whether the EEOC erred in finding that the formal complaints filed in May and June, 1987, were untimely, and that the circumstances did not require the agency to extend these deadlines.

The April 17, 1986, letter could not be a complaint. The regulations promulgated by the Commission, which

³ At oral argument, appellants contended that the fifteen day requirement for filing a complaint could not legally be imposed by regulation. Appellants offered no authority for this proposition, nor did they raise it in their briefs. We reject the argument.

are entitled to deference, *Natural Resources Defense Council, Inc. v. Hodel*, 819 F.2d 927, 929 (9th Cir. 1987); see also *Bell v. Brown*, 557 F.2d 849, 855 (D.C. Cir. 1977); require that a complaint be signed by the employee-complainant. 29 C.F.R. § 1613.214(a)(1). This section contemplates that an employee may have a representative, but still requires the employee to sign the complaint. The district court was correct in holding that the April 17, 1986 letter was not a complaint.⁴

After the plaintiffs filed formal complaints in May and June, 1987, the Commission determined that the complaints were untimely, and that there were no reasons to excuse the deadlines in each particular case. Because the formal complaints were not filed until 1987, and any counseling that had occurred had been terminated several years earlier, the complaints were not timely. The issue is whether the untimely filing of the formal complaints should be excused. We generally review agency decisions for an abuse of discretion. See 5 U.S.C. § 706(2)(A); *Blackfeet Tribe v. United States Dep't of Labor*, 808 F.2d 1355, 1357 (9th Cir. 1987). Cf. *Kontos v. United States Department of Labor*, 826 F.2d 573, 575 n.4 (7th Cir. 1987) (de novo standard of review applies to EEOC determinations as to whether deadline should be tolled under 29 C.F.R. § 1613.214(a)(4)). We need not determine what standard of review should apply, however, because even under a de novo review, we find no circumstances that

⁴ Even if this letter was deemed a complaint, the plaintiffs would still have the same problems, discussed below, regarding timeliness.

require equitable tolling of the time deadlines under 29 C.F.R. § 1613.214(a)(4).

Although plaintiffs alleged they were never told about the time deadlines in filing a complaint, they presented no evidence to the Commission that they were "otherwise unaware" of the time deadlines. *See* 29 C.F.R. § 1613.214(a)(4). The Commission specifically asked plaintiffs' attorney for information or arguments regarding why the time deadlines should be excused, but counsel presented no evidence. It was plaintiffs' burden to demonstrate to the Commission why the deadline should be excused, and they failed to meet that burden. The district court was correct in ruling that plaintiffs were not entitled to challenge the Commission's decisions by presenting to the court evidence that was not presented to the Commission. As a result, summary judgment was appropriate as to each plaintiff.

AFFIRMED.
